Supreme Court, U.S.
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No. 90-1937

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

WILLIAM F. PATY, Director, Department of Land and Natural Resources, State of Hawaii,

Petitioner,

vs.

MERVIN NAPEAHI, individually and on behalf of all those similarly situated,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court should accept certiorari to review any issue raised for the first time on appeal before this court in a case which does not call into question issues of wide import or applicability under the laws of the United States.

2. Whether this Court should consider the issue of respondent's standing in light of the paucity of facts on the record due to the failure of Petitioner to raise the issue below.

3. Whether Petitioner waived his Eleventh Amendment immunity when the state voluntarily appeared before the Ninth Circuit without raising this defense or any other now in his petition.

4. Whether this Court should defer this petition until the lower courts can adjudicate whether the Eleventh Amendment should be a bar to the action, since those courts have not yet fashioned appropriate remedies for relief.

5. Whether Petitioner has waived his right to object to the availability of a right of action under 42 U.S.C § 1983 by failing to raise this defense before the lower courts.

6. Whether Petitioner has waived seek abstention from this court by voluntarily appearing before the Ninth Circuit to defend and litigate the issues on the merits without objection.

3. Whether on the record before it, the Ninth Circuit decision reveals conflicts with prior decisions of this Court or other circuits as to:

   a. The standing of Respondent to seek redress for violations of the § 5(f) trust.

   b. The possible relief sought by Respondent to remedy a continuing violation of federal law.

   c. The right of Mr. Napeahi as a native Hawaiian to enforce the § 5(f) trust in an action under 42 U.S.C § 1983?

   b. Deferring to state tribunals in matters involving a breach of the § 5(f) trust.

   d. The assumption of federal question jurisdiction to consider the Respondent's claim for enforcement of the § 5(f) trust.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Mervin Napeahi hereby opposes the petition of William F. Paty, Director of the Department of Land and Natural Resources, State of Hawaii, for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on December 18, 1990.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Paragraph 3 of the Joint Resolution of Annexation of July 7, 1898 provides:

> The existing land laws of the United States relative to public lands shall not apply to such land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition: Provided, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes.

The Hawaii Admission Act § 5(f) provides:

> (f) The lands granted to the state of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other education institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and

> no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

Article XII, § 4 of the Hawaii State Constitution provides:

> The lands granted to the State of Hawaii by § 5(b) of the Admission Act and pursuant to Article XII, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by § 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

SUMMARY OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

This petition simply does not raise issues of such importance to merit review by this court. The applicability of the Ninth Circuit's decision is narrowly limited to the circumstances and law governing Hawai'i. Contrary to Petitioner's exaggerated perspective of the impact of the decision on other Western states, the Ninth Circuit ruling is confined to the operation of the unique trust imposed by the Hawaii Admission Act, § 5(f), in part for the benefit of native Hawaiians.

Furthermore, Petitioner raised none of the four major issues cited in the Petition before the Ninth Circuit. As such, two issues (a right of action under 42 U.S.C. § 1983, abstention) have been waived. The other two issues (United States Constitution, Article III standing and Eleventh Amendment sovereign immunity) may be raised and considered in this court's discretion. Nevertheless, this court should also deny certiorari because: (1) the standing claims are so heavily dependent on factual findings best left for the lower courts in the first instance; (2) the Ninth Circuit Court never ruled, and left no guidance, on the Eleventh Amendment

sovereign immunity claim being raised anew before this Court, and (3) there is no inconsistency between this Court's decisions on these issues and the Ninth Circuit's decision. Petitioner's failure to raise any of these issues before the Ninth Circuit is completely inconsistent with the alleged significance he attributes to the impact of this case.

Therefore, this Court should deny this petition.

I. THE SCOPE OF THE IMPACT OF THE NINTH CIRCUIT DECISION DOES NOT JUSTIFY REVIEW BY THIS COURT.

Rule 10, Supreme Court Rules, provides that:

> A review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

The essence of this rule has not always been appreciated by counsel for those petitioning for certiorari, who may have been mistakenly motivated merely to seek another hearing. Magnum Co. v. Coty, 262 U.S. 159, 163 (1934). As former Chief Justice Vinson indicated:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. ... The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. ... To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved. ... (emphasis added)

R. Stern, E. Gressman, and S.M. Shapiro, Supreme Court Practice, 190-91 (6th Ed.), citing Address of Chief Justice Vinson before American Bar Association, Sept. 7, 1949, 69 S.Ct. v, vi.

A. The Petition does not raise important federal questions of wide import under the constitution and laws of the United States.

The Ninth Circuit decision does not fit into the category of cases contemplated under Rule 10, Supreme Court Rules. First, the particular issues involved are not questions of "wide import under the Constitution, laws, and treaties of the United States." Furthermore, they do not "present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." This petition provides this Court the opportunity to interpret a federal statute which has direct relevance for only Hawai'i under the unique scheme for public land management established by Congress for the State of Hawai'i.

1. The Evolution Hawaii Public Land Laws Differed Markedly from Those of Other States.

The Hawaii Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4. [hereafter, "Hawaii Admission Act"] reflects the decision of Congress to treat Hawai'i entirely differently in matters of public land management than any other state in the Union. The hallmark of this approach is the so-called "ceded lands" trust, created under § 5(f) of the Hawaii Admission Act. 76 Stat. 4.

The ceded lands trust was the historical continuation of a public land trust that was initially imposed during the period of the Hawaiian Kingdom and continued through Hawai'i's annexation to the United States in 1898. The uniqueness of § 5(f) of the Admission Act, can be best appreciated in the context of the origins of public lands in Hawaii, the pattern of the trust duty over these lands, and the historical evolution of the special trust

established by § 5(f).

Prior to Western contract, Hawaiians had no concept similar to fee simple ownership. Rather, the land was held in trust for the gods, administered by a chief, and the use rights of each segment of the Hawaiian population were recognized.[1]

In the Mahele of 1848,[2] King Kamehameha III began the process of creating individual land ownership. He set aside approximately 1.5 million acres of Government lands "to the chiefs and people of my kingdom.[3] At the same time, Kamehameha III set apart for himself almost a million acres of lands for his own use, which came to be known as the Crown lands. Until 1864, these lands, originally referred to as the King's lands, were considered private property by a succession of Hawaiian monarchs.[4]

Following the overthrow of the Hawaiian Monarchy in 1893, the Crown Lands were effectively merged with the existing Government lands. Liliuokalani v. U.S., 45 Ct.Cl. 418 (1910). Subsequently, the Republic of Hawaii ceded the approximately 1.75 million acres of former Government and Crown lands to the United States by

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[1] R. Kuykendall, The Hawaiian Kingdom, pp. 227-68 (1938); L. Thurston, The Fundamental Laws of Hawaii, at 3 (1904).

[2] The Mahele (meaning division) of 1848 was the division of lands between the King and chiefs and is generally viewed as the initial step to instituting fee simple ownership in Hawaii. See, J. Chinen, The Great Mahele: Hawaii's Land Division of 1848 (1958); A. Lind, An Island Community, pp. 24-39 (1938).

[3] See, Estate of His Majesty Kamehameha IV, 2 Haw. 715, 722-723 (1864), for the English translation of documents effectuating the division of lands between the King and government.

[4] As a result of an 1864 decision by Hawaii Supreme Court and the Act of January 3, 1865, King's Lands became inalienable and known as the Crown lands to indicate that they belonged to the king as sovereign and not as an individual. Id.

consenting to the Joint Resolution of Annexation of July 7, 1898.[5] [hereafter, "Joint Resolution"]. The opening paragraph of the Joint Resolution ceded and transferred to the United States "the absolute fee and ownership of all public, Government, or Crown Lands . . . belonging to the Government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining . . ." The succeeding paragraphs vested all property and rights in the U.S., terminated treaties with foreign nations, and provided that the land laws of the U.S. should not apply to Hawaii.[6] 30 Stat. 750-52. Instead, the Joint Resolution further provided that Congress would enact special laws for the management and disposition of these ceded lands.

The third paragraph of the Joint Resolution placed a special trust on ceded lands and their revenues. Acknowledging that Hawaii had a well-established land tenure system and that the United States was receiving all the public lands free, Congress recognized that the use of public lands should continue to inure to the benefit of Hawaii's inhabitants. Thus, while the United States would hold the naked legal title to the lands, the beneficial uses were severed and allowed to remain with Hawaii's people.[7] This

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[5] J. Hobbs, "Hawaii: A Pageant of the Soil 118" (1953), 30 Stat. 750;

[6] As a result, unlike other states, Hawai'i never became part of the federal public domain except for its national parks, public buildings, and minor reservations. Comment, "Hawaii's Ceded Lands", 3 U. Haw. L. Rev., 101, 103 (1981).

[7] The U.S. had never allowed new states or territories to sever the beneficial uses and retain them for the indigenous population. In contrast, Texas, the only other state which like Hawaii had also been a sovereign nation, was allowed to retain full title to its public lands because it entered the Union as a state. See, "Hawaii Ceded Lands", Id. at 101, 110.

provision was unique in public land law, stating that ". . . all revenue from and proceeds from [ceded lands] . . .shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."[8]

In 1959, by enacting § 5(f) of the Admission Act, the federal government continued to embody and elaborate upon earlier trust provisions involving public lands.[9] The Act substituted the state for the federal government as trustee of these lands. While the legislative history of § 5(f) fails to provide detailed guidance for the trust language, it is clear that Congress was concerned with the welfare of Native Hawaiians.[10]

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[8] "The terms upon which Hawaii was finally annexed reveal the unique place occupied by its ceded lands in Congress' public land acquisition and ownership scheme." Id. at 111.

[9] In 1900, Congress passed Hawaii's Organic Act, 31 Stat. 141 (1900), which provided specific laws for the management of ceded lands. Section 91 of the Organic Act provided that ceded lands should remain in the possession, use, and control of the territorial government. Section 73 stated that the proceeds from the sale, lease or other disposition of ceded lands should be held for "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation. . . ." (emphasis added)

In 1921, Congress again recognized the unique relationship between the federal government and Native Hawaiians, in 1921 by passing the Hawaiian Homes Commission Act [hereinafter, "HHCA"]. 42 Stat. 108 (1921). The Act withdrew approximately 188,000 acres of ceded lands and brought them under the jurisdiction of a Hawaiian Homes Commission, to be leased in homestead lots to Native Hawaiians at a nominal fee for 99 years.

A Native Hawaiian was defined in the Act as "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA, § 201(f).

[10] In enacting the Hawaiian Homes Commission Act, Congress was guided by several factors. First, there was a fear that Hawaiians were dying out as a race; their economic, social and physical conditions were dismal and their continued existence was at risk. Second, it was recognized that with the drastic economic and political changes brought by Western contact, Native Hawaiians had been displaced from Native lands and their rights in such lands had not been adequately protected. See, Congressional Record, May 21,

Under § 5(f), Congress transferred the fee title to most of the ceded lands, with some exceptions, to the new State of Hawaii. In its drastic departure from the typical practice of retaining title to its federal public lands, it also impressed upon the new state a duty to hold all lands and the proceeds therefrom [in part] "as a public trust for . . . the betterment of the conditions of native Hawaiians." (emphasis added). § 5(f), Hawaii Admission Act. In 1978, the state affirmed its commitment, specifying in a constitutional amendment its duty to manage this public trust "for Native Hawaiians and the general public." Haw. Const. Art. XII, Sec. 4. Pet. App. at 105a.

This history clearly demonstrates that Congress' approach to establishing the public land management system for Hawaii differed vastly from that taken for admitting other states, even from its closest cousins, Arizona and New Mexico.[11] In most instances, Congress typically made relatively smaller grants of common lands, vested with a public purpose (usually for the support of public schools), available to the new states, retaining title to most of the lands it acquired for the federal public domain.[12] Also, it never imposed a trust obligation on these new states to manage the lands it did transfer for a distinct class of native people, as it did for Hawaii. This trust relationship was so unique and special that the United States returned the title of the ceded lands to the

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1920, at 7448, 7451-7453. Undoubtedly, these same concerns prompted the inclusion of the § 5(f) trust purpose on the betterment of conditions of Native Hawaiians.

[11]Comment, supra, note 9 at 102

[12]Id. at 108-110.

new state--"an act without precedent in United States history and one wholly contrary to established congressional public policy."[13]

In essence, the dispute resolved by the Ninth Circuit involves the interpretation of prior Hawaii Supreme Court decisions and federal statutes -- the Joint Resolution and the Hawaii Admission Act. Napeahi v. Paty, 921 F.2d 897, 903 (9th Cir. 1991). Pet. App. at 4a. This interpretation of interrelated federal and state law established that lands which erode after annexation and become submerged is part of the federally-imposed ceded lands trust administered by the State of Hawaii. Id.; See, also State v. Zimring, 566 P.2d 725, 736, 58 Haw. 106 (Haw. 1971)[14]. Respondent is a beneficiary of that trust.

2. The Petitioner Exaggerates The Impact Of The Ninth Circuit Decision Far Beyond Its Real Scope.

Petitioner contends that:

> [The decision] portends the imposition of intrusive federal judicial oversight, at the behest of any private litigant with an interest in state land management, over literally millions of acres of trust lands in the Western States. The Ninth Circuit's novel decision cannot be logically limited to suits brought by native Hawaiians, or, indeed, suits involving only Hawaii's submerged lands, or even Hawaii's public trust lands. (emphasis added)

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[13]Id. at 102.

[14]In Zimring, the Hawaii Supreme Court held that a lava extension into the ocean created new public land that the state, rather than the private landowner along the coastline, owned in fee. The basis for the holding was the court's interpretation of the legal effect of the language in the Joint Resolution, which at annexation effectively conveyed any inchoate right of the Republic of Hawai'i to claim lava extensions that may form in the future to the United States. The U.S. subsequently conveyed that right and title to future lava extensions to the State of Hawai'i under § 5(b) of the Hawaii Admission Act. Id.

Pet. App. at 7-8. Moreover, Petitioner argues that the decision has widespread ramification for "numerous States, upon their admission to the Union have been granted lands for various trust purposes." Id. Petitioner goes so far as to predict that the decision, allowed to stand will have, "absent congressional intervention, wide-ranging, permanent effects upon the economic, social and political development of Hawaii and numerous other States." Finally, Petitioner warns that the Ninth Circuit decision will spawn "a host of suits challenging management of the Government's fiscal operations that may redound to the detriment of particular groups and individuals." Id. at 20.

In fact, no other state is subject to a similar obligation to a class of native beneficiaries. The statutes cited by Petitioner, except for Arizona and New Mexico, do not even impose any explicit trust responsibilities on them as a condition of statehood. Pet. App. at 13, fn. 2. Typically, the statutes cited by Petitioner involve land grants for a variety of public uses by the state, primarily for school construction.[15] Furthermore, none of the cited statutes, including the Arizona and New Mexico one, provide for the benefit of a group of native people in the administration of the public land laws enacted for these states, as does § 5(f).[16]

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[15] See §6(a), (f), and (j) of the Alaska Admission Act, 72 Stat. 339, 340-341 (1958); §§ 4-13 of the Idaho Admission Act 26 Stat. 215, 215-16 (1890); §§ 10-13 of the North Dakota-South Dakota-Montana-Washington Enabling Act, 25 Stat. 676, 679-80 (1889); §§ 7-10 of the Nevada Enabling Act, 13 Stat. 30, 32 (1864); and § 4 of the Oregon Admission Act, 11 Stat. 383 (1859).

[16] See, §§ 7, 8, 9, and 10 of the Arizona-New Mexico Enabling Act, 36 Stat. 557, 562-65 (1910);

Thus, as the ASARCO decision demonstrates, this Court will not allow standing, even where a public land trust is involved, when the plaintiffs are merely taxpayers or citizens with no injury "distinct" from other taxpayers or citizens. Id. at 613. In contrast, native Hawaiians have an interest distinct from other Hawaii taxpayers or citizens, being specifically recognized as specific beneficiaries of the ceded land trust for the betterment of their conditions. Hoohuli, 741 F.2d 1169, 1181 (9th Cir. 1984).

The effect of the Joint Resolution and the Hawai'i Admission Act § 5(f) is relevant only to Hawaii and its specific ceded land trust. The Ninth Circuit's decision and any subsequent lower court's final judgment will only resolve an issue material to the preserving the integrity of federally-sanctioned trust assets with no precedence in United States history. Accordingly, the ramifications of the Ninth Circuit decision is really limited to, and affects, only Hawaii's administration of, the federal ceded lands trust that is unique to this state alone. The impact of this decision on other states would be negligible. Since none of these jurisdictions have a distinct subcategory of beneficiaries who are native people, the standing afforded to native Hawaiians to enforce § 5(f) is unique to Hawai'i.[17] Therefore, the Ninth Circuit

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[17] The Ninth Circuit in fact distinguished the Congressional land trust established in the Arizona-New Mexico Enabling Act, 36 Stat. 557 (1910), in rejecting an attempt to impose "certain methods of holding, managing and accounting for the ceded lands and income" on the State of Hawaii. Price v. State of Hawaii, 921 F.2d 950 (9th Cir. 1990). Citing Lassen v. Arizona, 385 U.S. 458, 465-70, 470-74 (1967), it found that the Arizona statute prescribed land management methods "in exquisite detail" which required that state to follow "those detailed provisions . . . for the most part." On the other hand, it found that § 5(f) conferred "considerably broader" authority on Hawaii, and refused to require specific methods for administering this trust. Price 921 F.2d at

decision presents no question of wide import under the Constitution, laws, and treaties of the United States.

B. The Ninth Circuit's Allowance of Beneficiary Standing is Consistent with this Court's Precedents.

Under Rule 10.1(a) and (c), Supreme Court Rules, one possible basis for allowing review on a writ of certiorari would be that a United States court of appeals has decided a federal question in a way that conflicts with applicable decisions of this court. Again, despite the alleged significance of this error, Petitioner failed to object ot Mr. Napeahi's standing in the Ninth Circuit, acceding to full briefing on the merits. This court should deny certiorari given the need for well-developed facts to support standing. See, Hoohuli v. Ariyoshi, 741 F.2d at 1180-81. Mr. Napeahi nevertheless addresses this issue should this court consider it.

Petitioner now initially suggests that the Ninth Circuit has overstepped its role by relying on "discredited" notions of the court's power under Article III of the U.S. Constitution. Alternatively, he suggests that the issues " ... at least raise substantial issues regarding "the proper - and properly limited - role of the courts in a democratic society." Pet. App. at 17-18, citing Warth v. Seldin, 422 U.S. 490, 498 (1975).

Petitioner argues that Mr. Napeahi does not have standing to bring this action because he lacks a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." citing, Allen v. Wright, 468 U.S. 737, 751 (1984). Pet App. at 18. Relying on the plurality

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955.

opinion in ASARCO, Inc. v. Kadish, 490 U.S. 605 (1989), (Kennedy, J., joined by Rehnquist, C.J., and Stevens and Scalia, JJ.), Petitioner specifically argues that a native Hawaiian litigant has no standing to challenge state actions involving the ceded lands trust, since the effectiveness of its remedy for any injury will depend on "... the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." Id. at 614-15.

This proposition is based on the notion that " no Hawaii citizen has any claim to a particular constellation of benefits from the 5(f) corpus." (emphasis in original). Id.:

> Even native Hawaiians, who are the special beneficiaries of trust funds created under State law and administered by the Office of Hawaiian Affairs, see Haw. Rev. Stat. § 10-13.5 (Supp. 1990), [fn4] have no particular entitlement to 5(f) funds, as the Office of Hawaiian Affairs, like any legislative body, enjoys the discretion rationally to pick and choose from among those native Hawaiian trust beneficiaries most in need of aid. (emphasis added). Id.

Accordingly, Petitioner argues the issues are not appropriate for judicial review under prior rulings of this court since they do not conform to the case or controversy requirements of Article III. Pet. for Cert. at 20.

Petitioner both misstates the applicable law and misinterprets the applicable issue before this Court. The Ninth Circuit has several times correctly held that a native Hawaiian beneficiary of a public charitable trust, like the ceded lands trust, has the requisite standing to sue to enforce the trust and tc compel adherence to its terms. Price v. State of Hawaii, 1991 WL 122418,

*2 (9th Cir. Haw.)[July 11, 1991]; Ulaleo v. Paty, 902 F.2d 1395, 1397 (9th Cir. 1990); Price v. Akaka, 928 F.2d 824, 8826-27, superceding, 915 F.2d 469, 47 (9th Cir. 1990) [hereinafter, "Akaka"]; Price v. Hawaii, 764 F.2d 623, 630 (9th Cir., 1985) cert. denied, 474 U.S. 1055 (1986); [hereinafter, "Price I"]; Restatement 2nd of the Law of Trusts, §§ 214(1), 391.

Any breach of this trust is an injury to native Hawaiians which is "distinct" from the general citizenry, since a specific allocation of funds to a native Hawaiian is affected. Compare, ASARCO, and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977). In addition, one like Mr. Napeahi can suffer a specific loss of access to, and the actual use of, important natural resource areas on submerged lands. Pet. App. at 95a.

Petitioner's misunderstanding of the issue and the law negates his contention that the Ninth Circuit decision below is at odds with the standing requirements articulated in ASARCO, Allen, Simon v. East Kentucky Welfare Rights Org., 426 U.S. 26 (1976), and Whitmore v. Arkansas, 110 S.Ct. 1717, 1725 (1990). If anything, Mr. Napeahi's standing is stronger than the plaintiffs who were found to have standing in Akaka.

First, Mr. Napeahi can show injury fairly traceable to Petitioner's conduct. Mr. Napeahi is a full-blooded Hawaiian beneficiary of the § 5(f) ceded land trust. Haw. Admission Act § 5(f); Haw. Const. Article XII, Sec. 4. See, Second Amended Complaint, Pet. App. at 95a. His injury, the improper diversion of the trust assets, and the resulting loss of 20% of the revenue foregone by that diversion, is directly traceable to Petitioner's

surrender of the 1.75 acres to a private hotel developer.[18] Id. at 95a-97a. Accordingly, the petitioner's basis for the argument that "no Hawaii citizen has any claim to a particular constellation of benefits from the 5(f) corpus" is simply not true in the case of native Hawaiians.

Even if there might be some dispute over how much is actually due because of differences in calculating revenues, the core requirement of this statute is clear. The key is that native Hawaiians are specifically entitled to 20% of ceded lands revenue, but have actually suffered a diversion of that amount "fairly traceable" to and "as a result of" the illegal surrender of ceded land. See, Arlington Heights, 429 U.S. 252; Allen, 468 U.S. at 751; Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 (1979). This connection is distinguishable from the more tenuous connection between the injury to indigent patients and the challenged IRS ruling that permitted some hospitals to refuse them admission. Compare, Hoohuli, 741 F.2d at 1180-81, and Simon, 426 U.S. 26.

Mr. Napeahi also specifically alleged he used the disputed submerged land area to gather foods and to enjoy the natural and aesthetic resources of the area. Pet. App. at 95a. The injury he suffered from the loss of use of the area is the type of noneconomic injury this Court has already readily acknowledged as the type sufficient to confer standing. Duke Power Co. v. Environmental Study Group, 438 U.S. 59 (1978).

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[18]Haw. Const. Art. XII, Sec. 4 establishes a public land trust for the benefit of native Hawaiians like Mr. Napeahi, and the general public. Pet. App. at 105a. Haw. Rev. Stat. § 10-13.5 specifically mandates that 20% of the revenues from the ceded land trust must be allocated to OHA to benefit native Hawaiians. Pet. App. at 116a.

Secondly, the requested relief would redress that injury by adjudicating the rights involved and compelling Petitioner to take affirmative future action to protect the trust res. Mr. Napeahi has sought appropriate declaratory relief and an order compelling Petitioner to conduct further proceedings to determine the lost value of the lands obtained by the State, and to refrain from future surrenders of submerged land without adequate procedural protections.[19] Pet. App. at 99a.

In contrast, Petitioner claims there can be no redress because of: 1) the lack of "'judicially discoverable and manageable standards' for determining the revenues to which OHA is entitled", 2) his freedom to make decisions which may not maximize income to the trust, 3) the "legislative choices" he alleges still need to be made to determine the type and amount of revenues subject to the 20% requirement, or 4) contingent events in the judicial system. Pet. App. at 9, 19 (n. 4), 20-21. Specifically, Petitioner claims there can be no redress because Mr. Napeahi cannot claim an entitlement to any specific monetary sum due to the discretionary power of OHA to allocate funds <u>after</u> it has gotten its 20% share. OHA's discretion to withhold government benefits from "certain native Hawaiians" is immaterial to whether the Court can declare a breach of trust as a result of a diversion of trust assets. <u>Id</u>. at 20, n.4.

However, the instant action is directed at an earlier point in

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[19]Since the complaint was filed, the Petitioner's Department promulgated new rules to require notice of pending shoreline certifications and to afford an opportunity for those aggrieved to request contested case hearings on those decisions. Hawaii Administrative Regulations, Title 13, Chapter 222. However, the adequacy of these rules has not been tested.

the legislative scheme of providing a trust fund for native Hawaiians before any discretionary finding decisions are made by OHA. It focuses on the failure to guard against improper diversion of trust assets. Petitioner has a nondiscretionary duty initially to (1) protect the trust res, then to turn over 20% of all revenue from ceded land dispositions, of whatever amount, to a native Hawaiian trust and (2) prevent future harm to important natural resource areas held by the state and utilized by native Hawaiians.

This distinction is central to what conduct of the state the Ninth Circuit will and will not scrutinize. In Price v. State of Hawaii, 921 F.2d 950 (9th Cir. 1990) [hereinafter, "Price II"] the Ninth Circuit held that it would not attempt to "micromanage" the state's administration of the ceded land trust, once it has received the revenues. Id. at 956. In particular, it declined to inquire into what "methods of holding, managing, and accounting for the ceded lands and income" the state must follow.[20] Id. However, the Ninth Circuit qualified its decision:

> That does not mean that the State can do what it likes with the property and the income [from ceded land dispositions]. Rather, the federal courts must ultimately determine whether the property has been diverted from section 5(f) purposes. That would, however, have to be in the context of litigation brought by the United States under section 5(f) or in the context of private litigation under Section 42 U.S.C. § 1983 which focused on some particular diversion. (emphasis added).

921 F.2d at 956 (9th Cir. 1990).

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[20] This part of the ruling supports Petitioner's position, but again, it is not relevant to the central issue in the instant action. Pet. App. at 7.

Mr. Napeahi is focusing on a "particular diversion"[21] by the state that violates the § 5(f) trust. The District Court can redress that failure to protect the trust res from an uncompensated private taking by requiring future action by Petitioner to forestall future diversions and enjoining future harmful conduct. The instant case specifically seeks to redress the improper surrender of property for no compensation, which forecloses any revenue to native Hawaiians for these dispositions of trust land. It also seeks to redress the surrenders of important submerged lands upon which native Hawaiians like Mr. Napeahi continue to depend to gather and maintain traditional cultural practices, which help to better the condition of native Hawaiians. In contrast to Petitioner's characterizations, native Hawaiians like Mr. Napeahi have a "particular, direct, and concrete injury," See, ASARCO, 490 U.S. at 616, from such ultra vires surrenders of trust land that judicial intervention can remedy by equitable relief directed at the Petitioner's challenged conduct. See, Simon, 426 U.S. 26.

Petitioner also carries his confusion to the specification of the questions presented to this court:

> 1. Whether private individuals who are only potentially beneficiaries of specific benefit programs administered with the public trust lands conveyed to Hawaii by § 5 of its Admission Act, Pub. L. 86-3, 73 Stat. 4, and **whose benefits will depend on decisions by**

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[21] By improperly certifying the shoreline in the Waikoloa area of the island of Hawai'i, the state allowed the uncompensated diversion of 1.75 acres of submerged land from a federal trust to go to the benefit of a private hotel developer. The hotel is currently using the property for strictly private, commercial uses, which is inimical to the purposes for the § 5(f) trust. This is exactly the type of diversion the Ninth Circuit contemplated being actionable under Section 1983. Price II, 921 F.2d at 956.

state officials who have lawful discretion to deny all benefits to such persons, may nonetheless, despite the jurisdictional limits of Article III and the Eleventh Amendment, seek relief in the federal courts whose effect would be only to increase the level of assets in the public land trust? (emphasis added).

2. Whether, § 5(f) of the Hawaii Admission Act, which requires that lands subject thereto be used for "one or more" of five purposes "in such manner as the constitution and laws" of Hawaii "may provide," and which authorizes a suit by the United States" as the stated remedy for the use of trust lands "for any other object," is enforceable by private citizen suits filed pursuant to 42 U.S.C. § 1983, and, if so, whether review in such suits includes not only whether the "one or more" clause has been generally complied with, but also **whether each and every state law bearing on the § 5(f) land trust has been obeyed**? (emphasis added).

Petitioner cannot ignore his fundamental duty to protect trust assets in part to better the conditions of native Hawaiians. By failing to establish precautions against such losses, he is continuing to deprive beneficiaries of both: (1) important submerged lands upon which they traditionally rely, or (2) their rightful 20% share of the value lost by improper dispositions, pursuant to state and federal law implementing that trust. Price II, 921 F.2d at 954-55; Akaka, 928 F.2d at 826-27. Conversely, the issue is not centered on the adequacy or level of benefits awarded by the Office of Hawaiian Affairs to its Native Hawaiian beneficiaries, or the management details of Petitioner's department, as Petitioner proposes. See, e.g., Price II, 921 F.2d at 955-56.

As such, Petitioner's characterization of the standing issue is misplaced. As a specific class of beneficiaries of the § 5(f) trust, native Hawaiians have standing to enforce a federal right as

a result of Petitioner's improper surrender of trust land. Akaka, 928 F.2d at 826-27. This right is distinct from that of the general citizenry. Id.; ASARCO, 490 U.S. at 613. The underlying claim in the instant action is just the type of diversion of trust assets the Ninth Circuit suggests is justiciable. Price II, 921 F.2d at 956. There is no inconsistency in what the Ninth Circuit is allowing and the notions of standing enunciated by this court, even in its plurality ASARCO, decision.

C. There are no particular "special and important" reasons under Rule 10.1(a), Supreme Court Rules, for granting review of the right to enforce state trust duties in federal court.

In addition, Petitioner attacks the purported attempt of a private citizen to question the State's discretionary "decision to prosecute 'when he himself is neither prosecuted nor threatened with prosecution.'" He claims that such legal challenges would also undermine "executive power to decline prosecution of civil claims". Pet. App. at 21, citing, Heckler v. Chaney, 470 U.S. 821 (1985).

This extension of the argument for discretion to pursue criminal prosecutions should have no bearing in the context of civil proceedings. Notwithstanding the Petitioner's mischaracterizations of the issues, there is no conflict between the Ninth Circuit's ruling and this court's previous pronouncements on Article III standing, prosecutorial discretion, federalism, or separation of powers.

Petitioner further claims the suit is in conflict with "Article III's concern for federalism and separation of powers principles," without elaboration. Pet. App. at 21, citing Allen.

Without more, this Court should ignore this argument as it adds nothing to the bare record before the Ninth Circuit on these issues.

Finally, the fact that there were six cases involving the ceded lands trust pending at the time of the Petition for Certiorari says nothing about whether it should be granted. Petitioner cannot support his claim that those cases threaten "disruption if not paralysis of the State of Hawaii's management of "its public lands". Pet. App. at 17. In fact, since the filing of the Petition, Petitioner has to concede that the state now has increased discretion to manage the public lands after prevailing on several cases.[22] Thus, if anything, there is a diminishing threat of disruption or paralysis on the State's management of the ceded lands.

II. THE ELEVENTH AMENDMENT IS NO BAR TO MR. NAPEAHI'S REQUESTED RELIEF.

This Court has considered an Eleventh Amendment defense even if raised for the first time on appeal. Ford Motor Company v. Treasury Department, 323 U.S. 459, 467 (1945). However, in a later case, it distinguished Ford Motor in determining that Iowa state attorneys had waived its sovereign immunity from suit under Iowa law by voluntarily appearing and defending the case on the merits,

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[22] The Ninth Circuit resolved Price II in the state's favor, allowing it broader discretion to manage the trust. In addition, the Office of Hawaiian Affairs prevailed in another state lawsuit, broadening its discretion to allocate ceded land trust revenues amongst its beneficiaries. Kepoo v. Burgess, No. 88-2987, (Haw. Sup. Ct. June 25, 1991). Finally, the Ninth Circuit recently affirmed the dismissal of a suit challenging the state's exchange of certain ceded land with a private landowner on the basis of the Eleventh Amendment. Ualelo v. Paty, 902 F.2d 1395 (9th Cir. 1990).

apparently abandoning its Eleventh Amendment defense raised in the initial answer to the complaint. Sosna v. Iowa, 419 U.S. 393, 396 n. 2 (1975).

Similarly, in Hawai'i, there is authority justifying a finding that Petitioner waived the State's Eleventh Amendment immunity by the state's voluntary appearance in the action and defense on the merits, in a case involving the education of handicapped children. Quote: The State waived immunity in this case by coming voluntarily into this Court in the face of the Congressional Grant of authority to provide all appropriate relief and by use of the appeal proceeding in this court when, under 20 U.S.C. § 1415, the state courts also had jurisdiction. Department of Education v. Katherine D., 531 F. Supp. 517, 529 (1982), aff'd in part, rev'd in part on other grounds, 727 F. 2d 809 (1982); cert. den. 471 U.S. 1117 (1984). The Hawaii Supreme Court also refused to consider upsetting the finality of a lower court judgment where a state agency only raised its sovereign immunity defense on appeal for the first time. Ahuna v. Department of Hawaiian Home Lands, 640 P.2d 1161, 64 Haw. 327, 333 n.9 (Haw. 1982),

In this instance, this Court should reject consideration of the Eleventh Amendment defense becauSE it was again raised for the first time in the petition. The lower courts never had a chance to visit this issue. By voluntarily appearing without challenge in the Ninth Circuit, Petitioner's counsel waived this defense. Petitioner nevertheless complains that the Ninth Circuit sua sponte failed to recognize that the Eleventh Amendment barred the action, despite his failure to call this issue to that court's attention. Pet. App. at 22. Where Petitioner has failed to raise any of the

issues raised in this petition before the Ninth Circuit, this court should decline to consider this particular immunity issue sua sponte out of practical concerns for judicial administration.

A. The Instant Action Is Not Ripe for Review By This Court Since the Lower Court Never Had the Opportunity to Fashion a Remedy That Would Not Be Barred Under the Eleventh Amendment.

In an analogous instance involving a pending determination of whether the State of Hawaii had deprived various landowners their due process rights involving water rights, the Court declined to participate under the standards of ripeness. Robinson v. Ariyoshi, 474 U.S. 1018 (1989), citing Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), 477 U.S. 902 (1986). In that case, this Court saw no reason to rule on the claim of an unconstitutional taking of a perceived property interest where the claimants could show no act by the state to deprive them of any water rights. Id.

Similarly, this Court should not attempt to prematurely second-guess the District Court for Hawaii. Petitioner should not be allowed to speculate on how that lower court would fashion appropriate relief. Instead, this Court should allow the Ninth Circuit to remand the case to the District Court, which should be allowed to determine the appropriate remedy in the first instance. In short, under the standards of ripeness, this Court should decline accepting the petition until the lower courts have had an opportunity to deal with the appropriateness of the remedy in this action in light of Williamson County and Sosna.

B. **In Any Case, The Ninth Circuit's Decision Is Consistent With This Court's Eleventh Amendment Decisions.**

Since this Court's decision in Hans v. Louisiana, 131 U.S. 1 (1890), state Defendants have been protected from suits by its own citizens in federal court. However, in Ex parte Young, 209 U.S. 123 (1908), this Court created an important exception to the general shield against such federal suits against state officials who have violated federal law. In Ex Parte Young, this Court upheld the lower court's injunction enjoining a state attorney general from a confiscatory railroad rate enforcing the schedule. The Court reasoned that a state official seeking to enforce an unconstitutional statute in the name of the state, "comes into conflict with the superior authority of that constitution, and he is in that case, stripped of his official or representative character." Id. at 159. In short, this doctrine makes possible the prosecution of claims by private parties in federal court for injunctive relief against state officials carrying out state policy, ultra vires, in violation of federal law. Id. at 157-60, See also, Florida Department of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982) (plurality opinion). Commentators have concluded that

> [I]n perspective the doctrine of Ex Parte Young seems indispensable to the establishment of constitutional government and the rule of law.

34 DePaul L. Rev. 515, n. 86, citing C. Wright, Law of Federal Courts, 292 (4th Ed. 1983).

On the other hand, attempts to seek monetary damages in federal court against state officials have been disallowed under the Eleventh Amendment. Ford Motor Company v. Treasury Department,

323 U.S. at 464. Furthermore, even if the monetary relief sought is characterized as equitable restitution, the Eleventh Amendment acts as bar as well. Edelman v. Jordan, 415 U.S. 651, 664-668 (1974). The relief sought in Edelman was cast as an action for declaratory and injunctive relief against a state official who had allegedly violated federal law in administering a welfare program by not complying with federal time limits for processing applications and making grants. This Court affirmed the injunctive relief to prevent continuing harm, but reversed the order to release retroactive benefits "which requires the payment of funds from the state treasury." Id. at 677. Under this analysis, this Court focused on the issue of whether the retroactive benefits were either: 1) merely ancillary to the injunctive relief and therefore, permissible as "an inevitable consequence" of the Ex Parte Young principle; or 2) in essence, for the recovery of money from the state and therefore barred by Ford Motor Company Id.

Petitioner fashions the instant action as one which should be barred under the Eleventh Amendment, because the only remedy that would be appropriate in the action would amount to "a substitute for the return of the trust corpus itself." Pet. App. at 23, citing Papasan v. Allain, 478 U.S. 265, 281 (1986). Petitioner urges this Court to characterize the relief sought in this action as "a one-time restoration of the lost corpus itself," which would be "an impermissible award of 'an accrued monetary liability'." Pet. App. at 15, citing Papasan, 478 U.S. at 281.

In Papasan, various school officials and school children in twenty-three northern Mississippi counties filed suit against various state officials, claiming that they were being unlawfully

denied the economic benefits of public school land granted by the United States to the State of Mississippi. Plaintiffs sued for breach of trust and denial of equal protection to remedy a gross disparity in funding levels for students in different parts of the state, caused by an ill-fated decision to sell trust lands to a railroad that was destroyed in the Civil War. Plaintiff sought money or land compensation to overcome the disparity.

The Supreme Court held that the breach of trust claim was barred by the Eleventh Amendment, but the "equal protection" action was not. The Court reasoned that the Eleventh Amendment barred relief that it "in essence serves to compensate a party injured in the action by an action of a State official in his official capacity that was illegal under federal law." Id. at 278. In contrast, this Court allowed "relief that serves directly to bring an end to a present violation of federal law...even though accompanied by a substantial ancillary effect on the state treasury." Id. Applying this distinction, the Court reasoned:

> [The] alleged ongoing constitutional violation - unequal distribution by the capital estate of the benefits of the capital estate's school lands - is precisely the type of continuing violation for which a remedy may permissibly be fashioned under Young. ... A remedy to eliminate this current disparity, even a remedy that might require the expenditure of state funds, would ensure "compliance in the future with a substantive federal-question determination" rather then bestow an award for accrued monetary liability. Id. at 282.

The fact that the Papasan case involved a claim for breach of trust does not automatically preclude any remedy involving such claims under the Eleventh Amendment. Pet. App. at 22 citing Papasan 478 U.S. 265. The distinguishing feature of the instant case is that the relief sought is not designed to order a payment

from the state treasury. See, Ford Motor Co., 323 U.S. at 464. Specifically, Mr. Napeahi is asking the lower court to order Petitioner to conduct further proceedings to determine the reasonable value of the submerged land abandoned ultra vires by Petitioner to the private land owner so he can later demand appropriate compensation.

Furthermore, the trial court could, and should, also be allowed the first change to fashion other appropriate relief, after considerations of the circumstances based on the outcome of the trial. It may conclude that Petitioner, having acted ultra vires, may also be found in violation of state law under Treasure Salvors. See, Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 116 n.11, n.25 (1984); Pet. App. at 99a. Accordingly, this Court should deny this petition as premature and allow a record to be built on this question.

Mr. Napeahi also asks for an injunction to prevent Petitioner from further recertification of shorelines in the State of Hawaii, which result in the abandonment of ceded lands to private interests without public hearing or notice, compensation, or explanation. Id.

Thus, the lower court can and should be allowed to enjoin Petitioner from acting in a way that constitutes a "continuing violation" of federal law the continuing loss of trust land for no compensation. Papasan, 478 U.S. at 282. The ancillary effect on the state treasury is at most minimal, rather than "substantial." Papasan, 478 U.S. at 278. The requested relief to compel future actions by the state is the same type of relief that would "directly bring an end to a present violation of federal law." Papasan, 478 U.S. at 278. Thus, neither of these forms of relief

fit in the category of those barred by the Eleventh Amendment under Papasan or Edelman.

The trial court could, and should, also fashion other appropriate relief, depending on the outcome of the trial, under the Ninth Circuit's ruling. Mr. Napeahi is attempting to enforce a trust for which the State of Hawaii accepted responsibility as a condition of statehood. See, Haw. Const., Article XII, 4. Inextricably tied to this responsibility is a federal law which set the parameters for this unique trust obligation -- the Joint Resolution and the Hawaii Admission Act § 5(f). Accordingly, this Court should deny this petition as premature.

C. The Litigation As To The State's Title Is Not Barred Simply By Calling It A Quiet Title Action Against The State in Federal Court.

Litigation as to the State's title, even if more land is sought for the state's land inventory, is not "independently infected by Eleventh Amendment error" simply because it is called a quiet title action against the state in federal court. Pet. App. at 22, citing Treasure Salvors, 458 U.S. at 700. The Petitioner's rationale is that nothing in the Eleventh Amendment permits the federal courts to serve as "fora for quiet title actions against the respective States," especially "when the operative issues turn on novel theories of state law." Pet. App. at 23, citing Pennhurst, 465 at 119-20.

As previously discussed, the instant case partially involves the adjudication of federal law. The effect of the Joint Resolution and the Hawaii Admission Act are indispensable to the Court's analysis. In this sense, the Treasure Salvors decision is

clearly distinguishable, although the lower court could also invoke pendent jurisdiction under this case for ultra vires acts. Similarly, because federal law is involved, Petition cannot rely on Pennhurst, which is based on the interpretation of state law only. Accordingly, this suit is not "federal interference in the State's management of their (sic) own affairs." Pet. App. at 7.

III. PETITIONER WAIVED HIS OBJECTION TO THE AVAILABILITY OF (1) A RIGHT OF ACTION UNDER § 1983 AND (2) ABSTENTION, BY FAILING TO RAISE THE ISSUES ON APPEAL BEFORE THE NINTH CIRCUIT.

In the absence of extraordinary circumstances, this Court will not decide an issue which was not presented to the lower appellate court. Delta Airlines v. August, 450 U.S. 346, 362 (1981); Adickes v. S.H. Kress and Co., 398 U.S. 144, 147 n.2 1970). This rule will only be disregarded in exceptional cases. Stone v. Powell, 428 U.S. 465 n.15 (1976). Normally, this Court may consider jurisdictional issues, even sua sponte, whether or not raised below. United States v. Storer Broadcasting Co., 351 U.S. 193, 197 (1956). Accordingly, Mr. Napeahi has responded to Petitioner's arguments relating to standing and the Eleventh Amendment sovereign immunity defenses. Nevertheless, Petitioner's failure to raise any of the issues in his petition below raises serious questions about propriety of resolving those issues before the lower court has considered them.

Furthermore, this Court will not decide a case on grounds in other instances of "plain error", unless that error "seriously affects the fairness, integrity, or public reputation of public proceedings". United States v. Atkinson, 297 U.S. 157, 160 (1936), quoted in Connor v. Finch, 431 U.S. 407, 421 n.19 (1977), See, Wood

v. Georgia, 450 U.S. 261, 265 n.5 (1981).

The question of whether § 5(f) creates enforceable rights under § 1983 is not the type of issue that affects the integrity of public proceedings, where the state has failed to raise it below. Thus, this court has refused to consider the late submission of whether a right of action under 42 U.S.C. § 1983 is barred where it was never first raised in the lower appellate court. See, Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 278-279 (1977); Cf., cited in, Ahuna, 640 P.2d 1161, 64 Haw. at 333.

Similarly, whether the federal district court should abstain from adjudicating an action is not considered a subject matter which this Court will consider when a state has voluntarily appeared below without objection:[23]

> Younger and these cases [omitted] express equitable principles of comity and federalism. They are designed to allow the State an opportunity to "get its own house in order" when the federal issue is already before a state tribunal.
>
> It may not be argued, however that a federal court is compelled to abstain in every such situation. If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system. (emphasis added).

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[23]Nevertheless, in spite of Petitioner's legal points, Petitioner's abstention argument must fail. That argument rests on false premises.

First, the "central question" of whether the rationale of State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977) regarding the state's inchoate property rights applied to eroded submerged lands is not one of purely state law. Pet. App. at 29. As earlier noted, Zimring, involved the interpretation of federal law in its analysis.

Secondly, abstention under Burford v. Sun Oil, 319 U.S. 315 (1943) is not applicable. Petitioner bases this argument on the unfounded perception that the District Court would interfere with "Hawaii's shoreline certification process...[which]...was fully in play." Pet. App. at 29. However, it is clear that there was no shoreline certification process in effect at the time, since no rules on shoreline certification went in effect until December 10, 1988. Administrative Rules, Title 13, Chapter 222. Again the sufficiency of these rules has not been tested. Supra, note 19.

Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 479-80 (1977), cited with approval in Swisher v. Brady, 438 U.S. 204, 213 (1977).

Therefore, these issues cannot be raised for the first time on appeal to this Court as Petitioner never raised these issues before the Ninth Circuit and has waived them.[24]

IV. THE FEDERAL COURTS HAVE FEDERAL QUESTION JURISDICTION OVER THE CLAIMS RAISED IN THIS ACTION.

The Ninth Circuit has logically and repeatedly held that federal question jurisdiction exists to entertain suits alleging violation of § 5(f) through 42 U.S.C. § 1983. Akaka, 928 F.2d at 827-28; Price II, 921 F.2d at 954-55; Price v. State, 764 F.2d at 628, citing with approval, Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467, 1472 (9th Cir., 1984).

This state statutory and constitutional entitlement for the benefit of native Hawaiians is "rooted in federal law." Hawaii Admission Act, § 5(f), Price v. Akaka, 928 F.2d 824, 828 (9th Cir. 1990), citing with approval, Keaukaha II, 739 F.2d at 1472. There is no reason for this Court to question these holdings, which are well-founded in federal jurisdiction even though Petitioner persistently, albeit unsuccessfully, attempts to do so.[25] In this

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[24] Accordingly, this Court should not hold the petition pending its decision in Suter v. Artist M., No. 90-1488 (U.S. Cert. granted May 3, 1991).

[25] The Ninth Circuit has expressed its consternation over the state's persistent refusal to accept its specific holdings on this issue:

> [W]e have been subjected to arguments by [state] appellees in this case...on issues which, themselves, have previously been settled by us. See, for example, Part A of this Opinion regarding standing. Appellees have even suggested that there is no section 1983 action

instance, Petitioner attempts to invoke a jurisdictional bar to this action by questioning whether "quiet title" actions present a federal question. This Court might address this issue as it may sua sponte. Storer Broadcasting, 351 U.S. at 197. Pet. App. at 24. He again raises the specter of the perceived broad impact of such actions, arguing against federal jurisdiction over suits "involving the rights to land acquired under a law of the United States." He contends that if such suits "'arise under "federal law... [then] every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws.'" Id., citing Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912).

First of all, the instant case is no typical quiet title case. It requires the interpretation of federal law to resolve this issue. Secondly, given the unique design and history of the ceded lands trust, it is especially difficult to cite to instances when the determinations like that of the Ninth Circuit's would have any impact outside of the District of Hawai'i.

The dated Shulthis case cited by Petitioner involved a private dispute between private parties over the rights to drill for oil and natural gas on lands allotted to a member of the Creek Nation.

> A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially

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available regarding failure to follow section 5(f) of the Act. Again, the contrary has long since been settled by us. See Price II, 921 F.2d at 956; Akaka, 928 F.2d at 827-28; Ulaleo, 902 F.2d at 1397; Keaukaha II, 739 F.2d at 1470-71; 1991 WL 122418, *6 (9th Cir.(Hawaii)).

> involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving the rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western States would so arise, as all titles in those States are traceable back to those laws. [citations omitted]. Shulthis v. McDougal, 225 U.S. 561, 569-70 (1912). (emphasis added).

The plaintiff-appellants' counsel cited various federal laws relating to the allotment in severalty of the lands of the Creek Nation, under which the suit supposedly arose. However, this Court restricted its consideration of jurisdiction based on the wording of the complaint alone, and found that it was not necessarily true that those statutes constituted the source of the complainant's claim. Id. at 570.

Clearly, Petitioner has cited Shultis out of context. That case merely established that federal jurisdiction does not always exist simply where title to land originates in a federal statute. However, jurisdiction can exist for a suit arising under the laws of the United States where the suit "substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends." Id.

In the instant case, the outcome of the Ninth Circuit's decision is based on its interpretation of both state and federal law (the Joint Resolution and the Admission Act). See, Pet. App. at 12a - 13a; See also, State v. Zimring, 566 P.2d 725, 735-36 (Haw. 1977). Contrary to Petitioner's characterization, the Ninth Circuit did not decide on the basis of only "state law doctrines of accreted rights to submerged lands." Pet. App. at 13, See, supra.

Accordingly, the decision was not dependent solely on "novel theories of state law." Pet. App. at 23, citing Pennhurst, supra.

In contrast to Shultis, the instant Ninth Circuit decision also involved the depletion of assets from a federally created trust, contrary to the federal and state law. It is of no import that the Ninth Circuit partially relied on state law in its preliminary ruling that submerged lands, which may have eroded since the Republic of Hawai'i's formal cession of lands to the United States in 1898, are considered ceded lands. That holding "substantially involves a dispute or controversy that was resolved by a determination of the construction or effect of" the Joint Resolution as it affected the lands ceded to the United States and returned to the state under § 5(f). Shultis, 225 U.S. at 570.

Therefore, the instant case presents no conflict with Shultis. Furthermore, since federal law is inextricably related to the result of the Ninth Circuit decision, there is federal question jurisdiction in this instance pursuant to 28 U.S.C. § 1331.

CONCLUSION

The failure to raise any of the issues on appeal below is inconsistent with the importance Petitioner currently attributes to them. Therefore, this Court should deny the petition either because Petitioner failed to raise significant issues below or misread the law as it applies to this action. This Court should allow the lower courts to initially adjudicate the issues, build a more complete record and fashion appropriate relief in accordance with this Court's prior decisions.